IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 3

W. E. GERBER, JR., and ANGLO-CALIFORNIA TRUST COMPANY (a corporation),

Appellants,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Appellees.

No. 3749

SUPPLEMENTAL BRIEF FOR APPELLANTS.

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Of Counsel.

Topical Index

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Pursuant to the permission granted at the oral argument of this cause, appellants file this their supplemental brief in reply to the points made in appellees' brief and oral argument.

A. Appellees' Brief in General.

Throughout appellees' brief are accusations that we have misstated or misrepresented the facts of the case. Thus (Appellees' Brief, p. 2) it is said that we omitted to state the facts in regard to the "Benowa" putting into San Francisco in distress and later arranging to discharge its cargo here. There was no such omission (Appellants' Brief, p. 3). It will appear that other facts whose omission is charged either were stated by us or else are entirely immaterial. The court will also note that, in the numerous instances in which it is charged we misstated the facts, our brief contains specific citations of the record in support of our statements; the passages cited speak for themselves.

It is also charged repeatedly that our arguments are not supported by citations of authorities. It is sufficient to say that in each of the instances in question our arguments are supported, not merely by citations, but by actual quotations from cases supporting our positions.

The attempt is made throughout appellees' brief to draw a pitiful picture of the straits in which libelants were left by their inability to collect their wages promptly.

Thus it is said that seamen are "wards of the court" (Appellees' Brief, p. 36). As pointed out at the oral argument, the "Benowa" is not an old-fashioned sailing vessel, but is a modern motorship, and her crew are a very different class of men from the ignorant seamen courts of admiralty have been accustomed to deal-

ing with. The shipping articles show (Apostles, pp. 443 to 445) libelants are all young men (only two of them being over thirty years of age), drawing good salaries (since practically half of the penalty awarded is payable to men earning monthly salaries of from $170. to over $300.). Such men are fully capable of protecting their rights.

> "Seamen are wards of the courts, no doubt, and are protected against their own carelessness. * * * Still they remain in some measure persons *sui juris*, and there is neither justice nor policy in aiding them to catch at penalties, where they have suffered no wrongs. The libelants were not helpless or ignorant victims, but alive to their rights."
>
> *Petterson v. United States,* 274 Fed. 1000, 1003.

Much is made of "their dire needs" (Appellees' Brief, p. 5), and it is said they were "in a city where they were unknown" (Appellees' Brief, p. 8), and that they were "left stranded without any means of support" (Appellees' Brief, p. 17). There is nothing in the record to support these statements. The only showing in the record as to the homes of these men is the statement of their birth places in the shipping articles, which show (Apostles, p. 443) that at least one of them is a native Californian. It may not be improper to depart from the record to such an extent as to say that we have seen several of these men in this city long after they had been paid off and received transportation East, and that our information is that others of them reside here.

The charge is also made (Appellees' Brief, p. 18) that the libelants were "ignored, worse than ignored".

The record shows nothing whatever as to any direct dealings between the libelants and the Pacific Motorship Company or the receiver. The passages relied upon in appellees' brief as authority for this charge show merely that Captain Renny, the master, not one of the libelants in this case, claims to have been treated discourteously by Mr. Ringwood, the president of Pacific Motorship Company. The record also shows, however, that Captain Renny was having trouble with Pacific Motorship Company over his claims (Apostles pp. 120 to 122), and it is reasonably to be inferred that the discourteous treatment of which Captain Renny complains was in relation to his own claim and not that of the crew. In fact, all of the representatives of Pacific Motorship Company with whom he testifies to having talked state positively that he never discussed the matter of the crew's wages with them (Apostles, pp. 172, 175, 192).

B. Appellants' Argument.

Appellants' brief stated ten main points, logically grouped, each one of which if sustained required either the modification or the absolute reversal of the decree. Appellees' brief is not subdivided and is not provided with an index. To the best of our ability we have segregated those portions of the brief which relates to the various points made in our brief and treat them hereinafter in that order.

FIRST. THE PENALTY.

I. Under no circumstances can any penalty be imposed for any period subsequent to April 27, 1921, the date of the tender to libelants under which more was deposited in the Registry than was subsequently awarded to libelants as wages.

(Appellants' Brief, pp. 17 to 20; Appellees' Brief, pp. 7 to 10, 32.)

It is said (Appellees' Brief, p. 8) that if the crew had accepted the tender "they would have been without any remedy for the time they had lost from March 17th to April 27th, which is a period of forty days." It would seem sufficient to point out that in the case of *Vincent v. United States,* 272 Fed. 889, recently decided by this court and cited on this very page of appellants' brief, under circumstances in this respect similar to the case at bar, notwithstanding the acceptance of such a tender the crew was allowed the penalty from the date when the court held the wages should have been paid to the date of the tender. In this respect the case is even stronger than that at bar, because the tender included payment of full wages up to the date of the tender, and it might well have been argued that the receipt of the full wages up to the date of the tender was a waiver of any penalty for the intervening period.

In the present case the tender was not offered in full satisfaction of the claim of libelants, but was unconditional (Apostles, pp. 44 to 46; 225; 243; 245 to 246). If by the statement to the contrary made in their brief and oral argument, appellees mean that the tender was accompanied by conditions to this effect which are not embodied in the record, we beg respectfully to assure

the court that such is not the fact. If we are to depart from the record to reply to this matter *dehors* the record, we say that we explained this matter definitely to libelants' proctor over the telephone at the time the tender was made and at a time when libelants' proctor advised us that libelant W. S. Austin, representing the rest of the libelants, was in his office.

It is also said (Appellees' Brief, p. 8) that we have cited no authority to substantiate this point. This court will note that we have not only cited, but quoted from the decision of the Supreme Court of the United States in *Pacific Mail Steamship Co. v. Schmidt,* 241 U. S. 245, 250 (Appellants' Brief, p. 19). The effect of this decision is, not merely that a shipowner has the right to contest his liability for the penalty and to delay the payment of the penalty while this contest is pending, without incurring additional penalties, but even that pending such contest in regard to the penalty he may delay payment of the wages themselves. We respectfully submit that this decision is controlling, so far as this point is concerned.

We pointed out (Appellants' Brief, pp. 19 to 20) that on May 17th libelants' proctor had agreed that the penalty should cease to run from that date on, and that in explanation of this agreement libelants' proctor had recognized that since we were willing that the money so tendered and deposited in court might be disbursed to the seamen, it was proper that the penalty should cease to run. And we said that if on May 17th it was proper that the penalty ceased to run, because we were willing that

the tendered fund be paid to libelants, it necessarily followed that it was proper that the penalty cease to run on April 27th, when the tender was originally made to libelants. Without disputing the force of our reasoning in this regard, appellees simply deny that any such agreement was made (Appellees' Brief, p. 7). Our statements in this regard, however, are not merely *ex parte* statements not based on the record, but are founded upon the letter of libelants' proctor confirming this agreement, which is set forth in full in the record (Apostles, pp. 239 to 242), and is precisely as quoted by us (Appellants' Brief, pp. 19 to 20).

In this regard it is also said that "counsel could not stipulate away any rights which the appellees herein might have under the decree" (Appellees' Brief, p. 7). It is sufficient to point out that the agreement was made May 17th, at which time there was no decree in existence, the interlocutory decree not having been entered until May 25, 1921 (Apostles, p. 233 to 234), and that this decree expressly recognizes the agreement in question by providing that the penalty shall run "for each and every day from and after the 17th day of March, 1921 until the 17th day of May, 1921" (Apostles, p. 232), and by providing that it be entered *nunc pro-tunc* as of May 17, 1921 (Apostles, p. 233). So far as concerns counsel's suggestion that the stipulation made by them was beyond his powers, we simply call attention to the fact that no such suggestion was made in his letter of May 19, 1921, confirming the agreement (Apostles, pp. 239 to 242). Obviously the stipulation was within the powers of counsel in a pending case.

It is said (Appellees' Brief, p. 8) that in *Vincent v. United States,* 272 Fed. 889, this court "disposed of this question." The penalty awarded in that case covered merely the period from the date the wages became due to the date of the tender and payment of the wages; no penalty was awarded for the period between the tender of the wages and the decree for the penalty. So far as it goes, therefore, the decision is an authority in our favor on this point.

A similar ruling was recently made by Judge Hand, saying:

> "Even so, their recovery would only be of four days' pay; i. e., from June 8th, four days after the discharge, until June 12th, when they were offered pay by the master."
>
> *Petterson v. United States,* 274 Fed. 1000, 1002.

II. No penalty should be imposed for any period subsequent to March 26, 1921, the date of the appointment of the receiver.

(Appellants' Brief, p. 20; Appellees' Brief, pp. 11 to 13, 19 to 21, 22 to 23.)

Appellees quote at length (Appellees' Brief, p. 12) an answer given by the receiver upon his cross-examination. The same quotation was made in the decision of the District Court (Apostles, p. 224), and was discussed in our brief (Appellants' Brief, pp. 22 to 25). As there pointed out, this answer was given on cross-examination, but was immediately explained upon redirect examination. The various steps taken by the receiver in regard to the "Benowa" are outlined in our

brief and are fully set forth in the portions of the record there cited.

It is also said (Appellees' Brief, p. 12) that the appointment of the receiver did not prevent application being made to the court to relieve the situation of the libelants. As pointed out (Appellants' Brief, p. 25) the receiver did make such application. It also appears that libelants received actual communications from the receiver (Apostles, pp. 452 to 453), that their proctor knew of the pendency of the receivership proceedings (Apostles, p. 201) and actually took part in them (Apostles, p. 302). It has not been suggested that any person was more fitted than libelants' own proctor either to make the application to the court for the relief of libelants' situation or to expedite the hearing of the application made by the receiver, nor has it been suggested that any obstacles were placed in the way of his doing so.

Finally an elaborate demonstration is made (Appellees' Brief, pp. 19 to 21) to the effect that the appointment of the receiver could not divest the admiralty court of the jurisdiction it had already acquired in this proceeding. No one has ever claimed the appointment of the receiver did divest the court of jurisdiction. Our point simply is that in exercising its jurisdiction the court sitting in admiralty cannot close its eyes and ears to its own proceedings in equity when they are properly brought to its attention, and that, so far as concerns the imposition of any penalty subsequent to the appointment of the receiver, the court on

its admiralty side should not penalize the parties for the alleged neglect of its own officer appointed on the equity side.

III. No penalty at all should be imposed.

(a) There was sufficient cause for the delay in the payment of the wages.

(1) *The financial condition of Pacific Motorship Company made the payment impossible.*

(Appellants' Brief, p. 30; Appellees' Brief, pp. 4, 13 to 14, 17 to 19, 23 to 26.)

Appellees dispute our statement (Appellants' Brief, pp. 31 to 32) that Section 4529 of the Revised Statutes is penal in its nature. Their argument is that this is not a penalty, but "liquidated damages for enforced idleness" (Appellees' Brief, pp. 17, 28). If these men had been working they would have earned only one day's pay for each day during the period of "enforced idleness"; this statute gives them two days' pay for each day, in addition to what they may earn by whatever other employment they may find. Clearly such a statute cannot be intended as liquidated damages. The only authority upon which appellees rely is *Covert v. British Brig Wexford,* 3 Fed. 577 (Appellees' Brief, p. 28). The British statute there enforced was fundamentally different from the present R. S. 4529 and resembles some of the predecessors of the latter section, in that the penalty was limited so that it could not run more than ten days. Certainly we cannot quarrel with the Judge for holding that penalty was liquidated dam-

ages. In the present case, however, libelants claim the penalty for more than two months and the amount is more than twice the total amount of the wages due. Clearly it is a penalty and nothing else. In addition to the authorities cited in our opening brief, holding that it is a penalty, we may call attention to the fact that in *Vincent v. United States,* 272 Fed. 889 (Appellees' Brief, p. 8), as well as in *Pacific Mail Steamship Co. v. Schmidt,* 214 Fed. 513, 520, this court so denominated it. We may also call attention to the recent statement of Judge Learned Hand that

> "the statute is penal and the right *stricti juris*".
> *Petterson v. United States,* 274 Fed. 1000, 1001.

The suggestion is repeatedly made (Appellees' Brief, pp. 4, 25) that Pacific Motorship Company might in some way have hypothecated the vessel so as to raise the funds necessary to pay libelants' claims. No specific suggestion is made, however, as to what steps Pacific Motorship Company should have taken or as to just who would have accepted such an hypothecation as security for a loan. The record shows clearly, however, that the "Benowa" was already hypothecated under a mortgage for $344,000 (Apostles, pp. 309 to 310) and an equitable mortgage for $1,625,000; that she was in the possession of the marshal under a libel *in rem* based on a maritime lien (Apostles, pp. 271 to 276), and that it was known that Pacific Motorship Company was hopelessly insolvent and had no credit at all (Apostles, pp. 196; 200; 204 to 206). It is obvious

that no responsible bank or other institution would have lent money under these circumstances.

It is also intimated (Appellees' Brief, pp. 13 to 14) that Pacific Motorship Company should have "taken the necessary preliminary steps to insure the government's withholding such an amount as might have been required to pay the wages to become due out of the freight moneys" (Appellees' Brief, p. 14). Libelants' proctor, Mr. Lillick, however, had full knowledge of the facts in connection with these freight moneys (Apostles, pp. 477 to 478) and in assigning sufficient of these moneys to their proctor to pay libelants' claims and in endeavoring to insure that he would receive it, Mr. Comyn, the general agent of Pacific Motorship Company, testified that he put the transaction "in the form that Mr. Lillick requested" (Apostles, p. 205). Libelants' proctor was a lawyer and familiar with the steps necessary to be taken; Mr. Comyn was not. It is submitted that libelants cannot now complain that the steps then taken were not sufficient.

It is also said (Appellees' Brief, p. 14) that Pacific Motorship Company must have known of its financial condition for some time prior to the arrival of the "Benowa" at San Francisco. The inference apparently is that appellees intend to argue that, foreseeing its financial condition, the Company should have provided funds in advance to meet the wages due libelants at San Francisco. But as pointed out (Appellants' Brief, p. 3; Appellees' Brief, p. 2) it was not expected that the "Benowa" would put into San Francisco.

She arrived here as in a port of distress, and even then it was expected that her voyage would be continued to Bremerton. Even if Pacific Motorship Company could have foreseen its own financial failure, it certainly could not have foreseen the particular events which occurred in regard to this crew.

Appellees ascribe to us the argument "that the burden of the responsibility for nonpayment of these wages should fall upon the seamen rather than the owner of the vessel" (Appellees' Brief, p. 13). Such has never been our position. As already pointed out (Appellants' Brief, pp. 34 to 35) the District Judge was absolutely right in his statement that "wages are a first and prior charge against the vessel" (Apostles, p. 227). Responsibility for the nonpayment of wages cannot be shifted, and it is not our position that it should be shifted. Our position simply is that, where payment of the wages is necessarily delayed without the fault of any person whatsoever, the crew is not to be enriched by the imposition of an undeserved penalty to the detriment of those having claims upon the vessel.

Appellees' final argument is (Appellees' Brief, p. 23) that it must be inferred that funds could have been raised to pay off the crew because Mr. Gerber arranged to purchase the claim of the Australian Government, amounting to $1,625,000, and then immediately advanced $5,609.20 to pay the wages of libelants. This is merely one element in the attempt made throughout appellees' brief, to which we shall later refer, to confuse Mr. Ger-

ber, the purchaser of the claim of the Australian Government, with Pacific Motorship Company, the equitable owner of the "Benowa". It is obvious, however, that the funds at Mr. Gerber's disposal and used by him in the purchase of the claim of the Australian Government could in no way have been at the disposal of Pacific Motorship Company, in which he had theretofore had no interest (Apostles, p. 209). Obviously, unless he had funds with which to meet the prior maritime liens on these vessels, Mr. Gerber would not have ventured anything in the purchase of the claim of the Australian Government. Nor, on the other hand, unless he was satisfied that he could purchase the Australian Government's claim, would he have been willing to advance sums to pay off the maritime liens. As we have already pointed out (Appellants' Brief, pp. 5 to 6), Mr. Gerber made his tender to libelants as soon as he had definite assurance that his negotiations with the Australian Government would terminate satisfactorily, and in fact before these negotiations were actually closed. The money tendered by Mr. Gerber, therefore, was not and could not be made available at any time before the date of the tender.

2. *The dispute as to the amount of wages due justified refusal to pay until this could be adjusted.*

(Appellants' Brief, p. 37; Appellees' Brief, pp. 10 to 11; 31 to 32; 32 to 33.)

In reply to our point that the original sum demanded by libelants as wages up to *March 15th* is $10,395.83, while the amount awarded by the court as wages up

to *March 17th* was $5,551.07, appellees state (Appellees' Brief, pp. 10 to 11; 31 to 33) that the sum stated in the libel includes not only wages but transportation money and subsistence during transportation. Certainly no such construction can properly be put upon the language used by libelants at the time. The schedule attached to the libel (Apostles, p. 18) has a column which totals $10,395.83, and which is headed "wages due". It cannot be inferred that this schedule intends to include under the heading "wages" anything but wages. Moreover, article II of the libel (Apostles, p. 14) contains the allegation that libelants "should receive *wages* in accordance with the schedule attached hereto". Separate allegations are made in regard to transportation and subsistence (Article VII; Apostles, p. 15). So also the telegram of libelants' proctor to the Navy Department, dated March 16, 1921, says "crew's *wages* unpaid" and states "the amount due crew, viz. ten thousand three hundred ninety-five dollars eighty three cents" (Apostles, p. 479). His letter of the same date to Admiral Halstead (Apostles, pp. 477 to 478) says that the owners of the "Benowa" "have not paid the *wages* due the members of her crew and there is today due the said crew $10,395.83". It is submitted that in all these documents the word "wages" must mean wages and cannot include other demands made by the crew.

Despite this language in all their documents, appellees insist that the amounts stated in the schedule do include transportation and subsistence and assert, as they say, "without fear of contradiction" that so con-

strued the demand set forth in the libel is the same as the amount ultimately awarded them. This assertion, however, is one which cannot rashly be made without fear of contradiction. The libel properly should have included wages only up to March 15th, and it is obvious that the wages up to that date must be less than the wages due as stated in the interlocutory decree, which carries wages up to March 17th. The amount due each of the libelants, except Crawford and Hughes (who received their transportation in kind, but as to whom the figure $175.66 may properly be interpolated) for transportation and subsistence are stated in the final decree. If libelants' assertion is correct, therefore, it should follow that the amount stated in the libel in each case should be slightly less (to allow for the two days' wages, between March 15th and March 17th) than the sum of the amounts stated in the interlocutory decree and the final decree. We are, therefore, able to make up the following:

Contradiction.

See Appellees' Brief, pages 10 to 11; also pages 31 to 32.

Source of figures.	Interlocutory decree. (Apostles pp. 232-233.)	Final decree (Apostles pp. 253-254.)	1+2	Libel (Apostles p. 18.)	4—3
Character of charge.	**Wages to Mar. 17.**	**Transportation and Subsistence.**	**Total due.**	**"Wages due."**	**Excess.**
Richard J. Spencer	$404.85	$175.66	$580.51	$623.85	$ 43.34
Christian V. Miller	355.20	175.66	530.88	568.10	37.24
Robert H. Councill	308.90	175.66	484.56	525.08	40.52
Tim Harrigan	159.30	168.77	328.07	352.39	24.32
Franklin Adrean, Jr.	129.35	168.77	298.12	333.04	34.92
Frank Garlock	155.85	168.77	324.62	333.04	8.42
Birger Johansson	152.80	168.77	321.57	333.04	11.47
Fritz Schilling	139.90	168.77	308.67	333.04	24.37
John Lahtimen	146.65	168.77	315.42	333.04	17.62
Wm. H. Crawford	517.30	*175.66	692.96	817.80	124.84
John Burton Hughes	303.15	*175.66	478.81	523.85	45.04
Walter S. Austin	347.45	175.66	523.11	568.35	45.24
Leon A. Carter	300.60	175.66	476.26	528.08	51.82
Campbell A. Hobson	169.97	168.77	338.74	354.73	15.99
W. Owens	174.15	168.77	342.92	354.73	11.81
W. C. Ward	166.99	168.77	335.76	354.73	18.97
N. E. Austin	167.03	175.66	342.69	430.38	87.69
Charles V. Smith	123.79	168.77	292.56	320.00	27.44
H. D. Wright	245.03	175.66	420.69	306.22	
Robert Doiyle	203.70	168.77	372.47	400.15	27.68
John Lopez	158.31	168.77	327.08	362.05	34.97
William Ovid	114.35	168.77	283.12	295.38	12.26
S. J. Ryan	123.33	168.77	292.10	307.03	14.93
C. Garfield	114.35	168.77	283.12	295.38	12.26
D. W. Davis	229.15	175.66	404.81	442.35	37.54

*Interpolated.

The only conclusion to be drawn is that the amounts originally claimed by libelants as wages had no relation whatever to the matter of transportation and subsistence money.

When this contradiction was pointed out at the oral argument, appellees, after considering the matter over the noon hour, came into court and read article VII of the libel (Apostles, p. 15). No other reply to the contradiction was offered. We submit that article VII of the libel assists the appellees in no way. All that can be gathered from this article is that while the court awarded to libelants as transportation and subsistence money the sums of $175.66 and $166.77 each, depending upon their grade, libelants on March 15th were demanding $209.82 each. That is, not only were their demands for wages excessive, but also their demands for transportation and subsistence.

It is said that we cannot "point to any part of the record where any question was made" as to the amount of wages due. In our earlier brief and herein we have referred to the demands originally made by the libelants. These were put in issue by article I of the receiver's answer (Apostles, p. 22) and by article II of the answer of the Commonwealth of Australia (Apostles, p. 27). In addition to these matters, it may also be pointed out that libelants were claiming wages, not merely to the time of their discharge, but to the time of their arrival home, during the period of their transportation there. This is brought out in the questions asked by proctor for libelants on the examination of Mr. Walter McArthur, Shipping Commissioner for this port (Apostles,

pp. 87 to 88). In accordance with Mr. McArthur's testimony, this point also was ruled against the libelants.

Their final answer to our argument on this point is in the form of a question (Appellees' Brief, pp. 32 to 33), as to why $12,000 was assigned to Mr. Lillick if there was controversy as to the amount of the wages due. The obvious answer to this question is that Mr. Lillick was financially responsible and would be liable for any misapplication of the fund assigned in case he paid the libelants more than was actually due them. On the oral argument, moreover, counsel for appellees stated more facts outside the record, hitherto unknown to us, and which we have not thought it worth while to verify, which seem to constitute a further answer to this question. Mr. Olson stated at the argument that it was understood that this fund when received was to be deposited by Mr. Lillick to his credit as trustee in one of the banks in San Francisco, and was to be disbursed by him in payment of the amounts due the members of the crew as they should be ascertained.

Throughout the brief counsel has insisted that we have misconstrued the record, on this point particularly. The portions of the record to which we call the court's attention speak for themselves and demonstrate that the language used by appellees is not only improper, but wholly unjustified.

3. *The acceptance by libelants of the assignment of freight money made it unnecessary for Pacific Motorship Company to pay libelants from some other source.*

(Appellants' Brief, p. 39; Appellees' Brief, pp. 4 to 6; 33 to 34.)

Appellees deny that any assignment was made (Appellees' Brief, p. 6). This denial is surprising, in the face of the record as cited by us (Appellants' Brief, pp. 4 to 5; 39). Apparently it is appellees' position that Mr. Comyn's testimony, that he made the assignment, is to be disregarded, or regarded as a mere conclusion and not a statement of fact, and that the telegrams referred to taken together do not constitute a sufficient assignment in law. We submit that upon reading the telegrams (Apostles, pp. 476 to 477) the court will conclude that they did constitute a sufficient assignment. It is quite clear, however, that it does not lie in the mouth of counsel for appellees, who drafted these instruments, to attack their legal sufficiency. Mr. Comyn's testimony is:

> "We assigned the freight on the 'Benowa' to Mr. Lillick for the payment of the crew's wages.
>
> Q. In what form did you make that assignment?
>
> A. The assignment was in the form that Mr. Lillick requested." (Apostles, pp. 204 to 205.)

Appellees' final question on this assignment might be answered in the affirmative. They ask, "Had the owner of the motorship 'Benowa' made a valid assignment of the freight money or a portion thereof due for the particular voyage in question, to the libelants in this case, would they not have obtained a release from all claims which the libelants may have had against them for wages?" (Appellees' Brief, p. 33.) As we have pointed out (Appellants' Brief, p. 41), while such an assignment ordinarily does not operate as a release and discharge of the indebtedness, nevertheless, if, as here, the assignee

suffers the assigned claim to be lost this operates as a release and discharge.

But even if such effect is not to be given to the assignment in the present instance, it is quite clear that the assignment having been made and accepted no penalty should be imposed because further steps were not taken to obtain funds for the payment of libelants.

(b) There is no allegation that the delay in payment was without sufficient cause.

(Appellants' Brief, p. 42; Appellees' Brief, p. 35.)

Appellees' only answer to our point is that no authority is cited holding such allegation necessary. In referring to our brief the court will find that we did cite *The Express,* 129 Fed. 655, 656, which decides the precise point which is here raised.

(c) The effect of the decree is to penalize, not the owners of the vessel, but those having liens upon her.

(Appellants' Brief, p. 44; Appellees' Brief, pp. 13, 22, 24, 35 to 36.)

On the day our brief went to press, the District Court rendered an opinion in another case, a copy of which we filed at the oral argument. In this decision, which covers the precise point now raised by us, Judge Dooling said:

> "The statute awarding penalties provides that:
>
> > 'Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seamen a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court.' (R. S. 4529.)

> In the present case neither the master nor the owner has any interest in the fund now in the registry of the court resulting from the sale of the vessel. To allow the penalties would be to transfer the burden thereof from the master and the owner to the lien-holders and the mortgagee. This I do not believe was ever contemplated, or intended by Congress in enacting the statute in question."

We submit that the reasoning of Judge Dooling is correct and that on the authority of this case and the *General McPherson,* 100 Fed. 860, 864 (Appellants' Brief, p. 44), the decree in the case at bar should be reversed.

Appellees make the point that the mortgage to the Australian Government was not a preferred mortgage under the Jones Act (Appellees' Brief, p. 22); but neither was the mortgage of the Shipping Board which was involved in the recent decision of Judge Dooling. There is obviously nothing in the point, for, while admiralty will not take jurisdiction to foreclose a common law mortgage, it is well settled that when admiralty has jurisdiction, as for instance in a suit on a maritime lien, it will exercise that jurisdiction with regard to the property rights of all parties, whether or not they may have maritime liens, and specifically that it will enforce the rights of a common law mortgagee.

The Gordon Campbell, 131 Fed. 963;
Topfer v. The Mary Zephyr, 2 Fed. 824.

As we have said, appellees persist in an attempt to identify Mr. Gerber, the appellant herein, with Pacific Motorship Company, the former equitable owner of the "Benowa". Thus appellees insist (Appellees' Brief, p.

35) that Pacific Motorship Company filed the claim herein. The record shows (Apostles, pp. 46 to 47) that the claim was filed, not by Pacific Motorship Company, but by the receiver. This also appears from the receiver's answer (Apostles, pp. 24 to 25). It is also said (Appellees' Brief, p. 24) that we, who appear in this case on behalf of Mr. Gerber, "apparently represented Mr. Comyn". This statement is, if course, entirely outside the record. The fact, however, that in other matters we have represented Mr. Comyn does not disqualify us from acting for Mr. Gerber in the present case. Mr. Comyn was not the Pacific Motorship Company and had no interest in the Company, except as a creditor in the sum of about $85,000 (Apostles, p. 211). He had been its general agent (Apostles, p. 199), and it was only natural that Mr. Gerber on acquiring the predominating interest in these vessels should have obtained Mr. Comyn's assistance and should have employed us, who have acted for Mr. Comyn in other capacities. Reference is made (Appellees' Brief, p. 13) to the supersedeas bond filed herein, which, at the oral argument, appellees stated had been filed by the claimant. The bond appears in the record (Apostles, pp. 422 to 424). It was given by Mr. Gerber, the substituted intervening libelant. Anglo-California Trust Company, the substituted claimant, gave merely a cost bond (Apostles, pp. 417 to 420). The suggestion is also made (Appellees' Brief, p. 23) that Mr. Gerber purchased this claim "in behalf of the owners or some person or firm interested in the Company". Mr. Gerber's testimony (Apostles, pp. 209 to 210) is direct and positive that this is not the fact. We submit that a reading of the whole record will demonstrate that

Mr. Gerber has not, and never did have, any connection with Pacific Motorship Company, and that he is in no way to be identified with that corporation.

Mr. Gerber's interest is primarily as assignee of the claim of the Australian Government, a mortgage for $344,000, and an equitable mortgage for $1,625,000. In addition to that he has from time to time acquired various maritime liens upon the "Benowa," including, perhaps, a lien for the $5,609.20 tendered to libelants, or to such portion thereof as has actually been collected by them under that tender. Obviously Mr. Gerber is in no way responsible for the failure of Pacific Motorship Company to pay libelants. Even if Pacific Motorship Company should properly be subjected to a penalty under all the circumstances in this case, under the plain language of the statute and under the recent decision of Judge Dooling this penalty can in no way be extended to Mr. Gerber.

IV. The amount of the penalty is computed wrongly.

(Appellants' Brief, p. 46.)

Appellees have conceded this point, making no answer whatever. This alone requires a modification of the decree.

SECOND. LIBELANTS SHOULD HAVE ACCEPTED THE TRANSPORTATION OFFERED BY GERBER AND NOT RECOVERED MONEY IN LIEU THEREOF.

(Appellants' Brief, p. 47; Appellees' Brief, pp. 36 to 37.)

On this point we are satisfied with the discussion in the two briefs already on file, and submit that in this respect also the decree must be modified.

THIRD. IT WAS IMPROPER TO ENTER A DECREE FOR THE SALE OF THE VESSEL UNDER A JUNIOR LIBEL WITHOUT CONSOLIDATING IT WITH EARLIER LIBELS AND INTERVENING LIBELS UNDER WHICH THE VESSEL IS HELD BY THE MARSHAL, AND WITHOUT NOTICE TO THESE LIBELANTS AND INTERVENING LIBELANTS.

(Appellants' Brief, p. 49; Appellees' Brief, pp. 37 to 39.)

Appellees quote (Appellees' Brief, p. 37) from *Hughes on Admiralty.* The passage quoted seems to leave the matter in a state of confusion. The text, however, follows immediately with an explanation of what the writer regards as the proper rule, which is in accord with the rule as laid down in our brief and directly opposed to the practice adopted in this case by the appellees. Appellees also quote Admiralty Rule 25 of the District Court (Appellees' Brief, p. 38), which we submit can have no bearing here, and Admiralty Rule 40 of the Supreme Court of the United States (Appellees' Brief, p. 38), which is absolutely colorless in so far as this particular point is concerned.

Appellees apparently concede our point and attempt to support the decree by going outside of the record to make the statement that Judge Neterer actually did ask their proctor "to notify the other claimants of the hearing, which was done" (Appellees' Brief, p. 38). The only counsel appearing in the various libels filed on the "Benowa", outside of Messrs. Thacher & Wright and Mr. Lillick, are Messrs. Goodfellow, Eells, Moore & Orrick and Mr. Resleure. On our communicating with each of these offices, we were first informed that they had no recollection of any such notice. We asked them to in-

vestigate their records and ascertain whether there was any written notice or any record of any notice whatever. Each of them has advised that no such record exists and no copy of any written notice appears. The court will take these various statements, both on our part and on that of the appellees, for what they are worth. We submit, however, that if the jurisdiction of the court to render a decree is to be determined by ascertaining whether lawyers have recollection of receiving notices which apparently have not been filed and are no part of the record of the court, confusion is bound to arise.

C. Unrelated Matters.

Considerable stress is laid by counsel upon certain matters not discussed in our brief, and which we consider irrelevant to the case.

FIRST. PROVISIONS.

Appellees state in detail (Appellees' Brief, pp. 2 to 3) and quote the testimony (Appellees' Brief, pp. 30 to 31) in regard to an alleged failure on the part of Pacific Motorship Company to supply proper provisions to the "Benowa". As already stated (Appellants' Brief, p. 24), the record shows that there were sufficient provisions on the "Benowa" (Apostles, pp. 63 to 64; 175 to 176).

The whole matter of provisions, however, is outside of the issues of this case. The libel contains no allegations whatever with regard to any deficiency of provisions (Apostles, pp. 12 to 16), nor is there anything in

the decree relating to provisions. It is true that in Judge Neterer's original opinion (Appellants' Brief, p. 7 and appendix) there was a clause in regard to provisions. This clause, however, was eliminated in the supplemental opinion, apparently because the attention of the learned judge had been called to his own earlier decision in *The Rupert City,* 213 Fed. 263, 274 (Appellants' Brief, p. 24), under which case and the authorities there cited it is quite clear that there is no liability for provisions subsequent to March 10th, the date the "Benowa" was taken in charge by the marshal (Apostles, p. 276).

SECOND. DEMANDS UNDER R. S. 4530.

(Appellees' Brief, pp. 3 to 4; 14 to 16; 39.)

Appellees' brief states repeatedly that demands were made by the crew for half their wages in accordance with Section 4530 of the Revised Statutes, which section, as it read before its last amendment, they set forth at length (Appellees' Brief, pp. 15 to 16). This section now provides that "Every seaman * * * shall be entitled to receive on demand * * * one-half part of the balance of his wages * * * at every port where such vessel * * * shall *load or deliver cargo before the voyage is ended.*" As pointed out (Appellants' Brief, p. 3; Appellees' Brief, p. 2), the "Benowa" originally put into San Francisco, not as a port at which she would "load or deliver cargo", but as a port of distress. The statute was, therefore, inapplicable and for that reason the District Court held that the master was justified in refusing the demands for half wages made upon

the arrival of the vessel (Apostles, p. 223). In their oral argument, appellees said that this demand was repeated continually thereafter. There is nothing in the record to support this statement, or to show any such demands, except those made upon the arrival at San Francisco, and before it had been determined that the vessel would remain here. But even demands made after this determination would have been unavailing, because as soon as this determination was made, San Francisco became the port where the voyage ended, and therefore, by the express terms of the statute, was excluded from its operation.

The whole matter is irrelevant, since there is nothing in the libel (Apostles, pp. 12 to 16) relating to any such demands. Moreover, even if any such demands had been made, they could not assist libelants in this appeal, so far as the penalty under *R. S.* 4529 is concerned. It is true that section 4530 provides that where such demands have been made properly and refused it "shall release the seaman from his contract and he shall be entitled to full payment of wages earned." If the demands made on the arrival had been proper, or if proper demands were subsequently made after the vessel's destination had been changed, the result would be that the term of service of libelants would have expired either on February 28th, or on March 9th as the case might be, so that, instead of being entitled to wages up to March 17th as allowed by the District Court, the wages would cease as of February 28th or March 9th. That is, libelants would have been entitled to even less wages than were awarded to them by the District Court.

So far as the penalty under *R. S.* 4529 is concerned, the penalty is imposed by that section only for failure to make payment "*in the manner hereinbefore mentioned,* without sufficient cause." The penal provision of *R. S.* 4529 for failure to pay as provided by that section cannot be carried over into the succeeding section so as to penalize the master or owner for a failure to comply with the provisions of that succeeding section. It follows, therefore, that if *R. S.* 4530 is applicable *R. S.* 4529 cannot be applicable. The two are mutually exclusive.

As we have said, each of the ten points stated in our brief and mentioned again in this supplemental brief is sufficient to require either the modification or the absolute reversal of the decree. We have answered specifically in their proper order hereinabove those portions of appellees' brief which relate to each of these various points and have, we submit, demonstrated sufficiently that nothing which has been adduced by appellees in any way answers the arguments originally outlined by us. We submit also that the two unrelated matters, to which appellees have so frequently referred, have no bearing whatever upon the case. We, therefore, respectfully submit that the decree must be reversed.

Dated, San Francisco,
November 12, 1921.

PILLSBURY, MADISON & SUTRO,
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